APPEAL NO. 010646

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was opened on November 6, 2000, and closed on February 27, 2001. With respect to the issue before her, the hearing officer determined that the first certification of maximum medical improvement (MMI) and impairment rating (IR) became final under Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.5(e) (Rule 130.5(e)) since it was not timely disputed. Although noting that the treating doctor disputed this IR, she held that it was not done on behalf of the appellant (claimant). The claimant urges on appeal that this determination is against the great weight of the evidence. The respondent (carrier) urges affirmance.

DECISION

We affirm the hearing officer's decision.

This case involves a back injury of _____, which was initially treated as a strain but later proved to be a herniated disc and was approved for spinal surgery through the second opinion process. At issue was whether the certification of MMI and IR of a carrier doctor, Dr. S, became final in accordance with the effective version of Rule 130.102(e). The complexities of this case boil down to one threshold determination of the hearing officer--that Dr. A, the treating doctor, did not have the involvement or sanction of the claimant when he indicated dispute on the bottom of Dr. S's IR, or when he wrote a November 23, 1999, letter indicating his disagreement with that IR.

We first note that Rule 130.5(e) was found invalid very recently by the Austin Court of Appeals in the case of Fulton v. Associated Indemnity Corporation, 2001 WL 359622 (April 12, 2001), but the Texas Workers' Compensation Commission is not applying this decision pending further appeal. As to the threshold determination of the hearing officer, she did not believe the claimant when he asserted that he had returned to Dr. A's office the afternoon after he received Dr. S's report to discuss it with Dr. A, and at that time authorized a dispute.

While this is clearly a case where different inferences could have been drawn from the evidence, the hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). As that is not the case here, we affirm the decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Philip F. O'Neill
Appeals Judge